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No. 75-1820

In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK M. STRICKLIN, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners claim that the warrantless nighttime stop and search of a pickup truck, which disclosed marijuana, violated the Fourth Amendment.

Following a jury-waived trial in the United States District Court for the District of New Mexico, petitioners were convicted of possession of marijuana with intent to distribute and of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioners Stricklin, Harris and Johnson were each sentenced to concurrent five year terms of imprisonment to be followed by concurrent terms of four years' supervised probation; petitioners Franklin and Russell were each sentenced to concurrent five year terms of imprisonment to be followed by concurrent terms of three years' supervised probation. The court of appeals affirmed (Pet. App. B 9-18).

Early on the morning of August 18, 1974, Wildlife Officers of the New Mexico Department of Game and Fish, on patrol for illegal nighttime hunting, observed a pickup truck and an automobile pulling a U-Haul trailer traveling in tandem in a thinly populated ranch and recreation area northeast of Roswell, New Mexico (Tr. 7-8, 18-19). Both vehicles were observed to be sweeping their headlights into the fields along the side of the road, a practice commonly employed in illegal nighttime hunting (Tr. 9-11, 19).

The officers stopped the vehicles. Petitioner Stricklin, the driver of the pickup truck, informed Officer Turner that he and his companions had two pistols with them. In the cab of the pickup truck Officer Turner saw a .38 caliber revolver, a hunting knife, and five battery-powered handlights, implements frequently employed in nighttime hunting (Tr. 22-23, 25). A search of the glove compartment disclosed a .22 caliber magnum pistol with a starlight scope (Tr. 26). Turner then went to the bed of the pickup, where petitioners Harris, Johnson and Franklin had been riding, and searched several unrolled sleeping bags for weapons or game. In one of them he discovered two "bricks" of marijuana (Tr. 29-30).

The automobile pulling the U-Haul came to a stop at the rear of the pickup. The driver, petitioner Russell, told Officer Moody that the U-Haul contained only household goods (Tr. 28-29). After the marijuana was discovered in the pickup, New Mexico State narcotics agents were called to the scene. Agent Franco detected a strong odor of marijuana emanating from the U-Haul, whereupon it was forcibly opened, revealing what turned out to be 2,250 pounds of marijuana (Tr. 84-86).

The courts below correctly applied settled principles to the particular facts of this case, and the petition presents no legal issue warranting further review.

1. Petitioners claim first that the initial stop of their vehicles was unlawful. But the state wildlife officers had seen, at approximately 3:30 a.m., two vehicles travelling in tandem in a thinly populated ranch and recreation area where illegal nighttime hunting was not uncommon. In addition, the officers had seen the vehicles cast their lights from side to side in a manner similar to that employed by illegal "spotlight" hunters seeking to locate game along the roadside. These observations of likely illegal activity were enough to justify the officers' initial detention of the vehicles. See *Terry* v. *Ohio,* 392 U.S. 1.

United States v. *Brignoni-Ponce,* 422 U.S. 873, cited by petitioners, supports the government's case rather than theirs. In that case the Court ruled that Border Patrol agents on roving patrol can lawfully stop vehicles in the border area on reasonable suspicion (not amounting to probable cause) based on specific articulable facts. The facts recounted above were specifically articulable and justified the officers' reasonable suspicion that criminal activity was afoot.

2. Petitioners' second claim is that, even if the initial detention was lawful, the subsequent search of the sleeping rolls in the bed of the pickup truck was not. But petitioners themselves concede (Pet. 9) that Officer Turner's discovery of the pistol in the truck (not to mention the five hand-held lights), combined with the casting of artificial light in an area where game might reasonably be expected to be, "might have produced a technical violation of the New Mexico Statute" forbidding nighttime "spotlight" hunting. Petitioners Harris, Johnson, and Franklin were riding in the open bed of the pickup truck. These factors—probable cause to believe a crime was being committed, and the presence of the three petitioners in the bed of the truck—gave the officers probable cause to

believe that further evidence or fruits of the crime would be found in the bed of the truck and the items lying therein.

3. Petitioners also contend that the officers should have obtained a warrant before searching the bed rolls (Pet. 9-10). As we have just shown, however, the officers had probable cause to search the truck, and it is well settled in cases of this sort that automobiles may be searched upon probable cause without a warrant. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.